IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7841 of 1990
WITH
SPECIAL CIVIL APPLICATION No. 7842 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL MOHANBHAI ISHWARBHAI - Petitioner(s)
Versus
STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :

MR RS SANJANWALA for Petitioner(s) : 1,MR SH SANJANWALA for Petitioner(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5
MR.MR MENGDE AGP for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2,4 - 5.
UNSERVED-EXPIRED (R) for Respondent(s) : 3,
MR UM SHASTRI for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 01/11/2006

ORAL JUDGMENT

1. Mr.S.S. Sanjanwala, learned counsel appearing for the petitioners seeks leave to delete respondent No.3, who is reported as expired, on the ground that the matter

before the State Government was contested only by the petitioners having purchased the land by registered sale deed after payment of the consideration to the original owner. Considering the facts and circumstances, leave granted.

2. In view of the aforesaid order, the matter shall be essentially between the petitioners and the State Government having exercised the revisional jurisdiction against the order passed by the T.D.O. granting N.A. permission of the land in question.

3. The short facts of the case appear to be that one Mahijibhai Somabhai was holding the land at village Maghasar, Taluka Halol, District Panchmahals applied for permission for non-agricultural use of the land to Taluka Panchayat, Halol on 15.09.1980. The Taluka Development Officer passed the order on 24/25.11.1980 granting permission for N.A. use of the land in question. One of the conditions No.18 of the permission was to pay premium of Rs.18,906/- to the District Collector, Panchmahals after obtaining permission from the District Collector. However, subsequently, on 11.05.1981, a modification of the said conditions was ordered by the T.D.O. whereby, the stipulation for obtaining permission from the

District Collector was deleted and condition No.18 was substituted by providing that since the land is subject to the restriction under Section 43 of the Bombay Tenancy and Agricultural Lands Act (hereinafter referred to as the 'Act') the premium of Rs.18,906/- shall be required to be deposited with the State Government. It appears that the entry came to be mutated in the revenue record and the petitioners thereafter, have purchased the said land by registered sale deed dated 26.12.1980. It appears that the State Government on 05.12.1988, initiated the proceedings under Section 211 of the Bombay Land Revenue Code (hereinafter referred to as the 'Code') and called upon the petitioners and others to show cause as to why the matter should not be taken in revision against the order passed by the T.D.O. for grant of N.A. permission. The petitioners submitted the reply and the record shows that the original holder of the land namely Shri Mahijibhai Somabhai did not make any representation, possibly because the land was already sold by him to the petitioners. The State Government after hearing the petitioners, who were occupant of the land and holding the land on the relevant point of time, passed the order and the order of T.D.O., granting permission for N.A. use was set aside and it is under these circumstances, the petitioners have approached to this Court by preferring

the present petitions.

4. Heard Mr.S.S. Sanjanwala, learned counsel appearing for the petitioners and Mr.M.R. Mengde, learned A.G.P. appearing for the State Authorities.

5. It is not in dispute that the land was situated at village Maghasar of Taluka Halol, District Panchmahals nor the date of passing the order by T.D.O. i.e. 24/25.11.1980 is in dispute. The learned counsel appearing for the petitioners submitted that thought the resolutions, on the basis of which, the powers were delegated by the District Panchayat to Taluka Panchayat and in tern to Taluka Panchayat to the T.D.O. for the purpose of exercise the power under Section 65 of the Code and the resolution of the State Government authorising the concerned authority granting permission under Section 65 of the Code to fix the premium under Section 43 of the Act are not on record but there is reference to both the aspects in the decision of this Court in case of M/s.Yashkamal Builders, Baroda V/s. State of Gujarat and another reported in 1989(1) GLR 382 and another decision of this Court in case of Minaben Arvindlal Gandhi V/s. State of Gujarat and others reported in 1992(1) GLR 413. The learned counsel

submitted that so far as the delegation of power by the District Panchayat to Taluka Panchayat and in turn to T.D.O. in case of M/s.Yashkamal Builders, Baroda (Supra) the same was the position as the land in that case was situated in Halol Taluka of Panchmahals District as is in the present case. He further submitted that for fixation of the premium, the resolution was general of the state Government for which, reference is there in the decision of this Court in case of Minaben Arvindlal Gandhi (Supra) and it is only after 16.10.1982, the State Government passed another Resolution modifying the position and requiring permission for fixation of the premium by making reference to the District collector and/or Deputy Collector. He therefore, submitted that it is not a matter where there were no powers at all with the T.D.O. for granting permission or for fixation of the premium under Section 43 of the Act. However, he additionally submitted that the exercise of the power is in any case beyond unreasonable power and delay operates against the initiation of the action by the State Government in revisional jurisdiction.

6. Mr.M.R. Mengde, learned A.G.P. has supported the order passed by the State Government. However, he is not in a position to dispute the existence of the resolution

of the District Panchayat for delegation to T.D.O. or the delegation of the powers to the T.D.O. or fixation of the premium under Section 43 of the Act as prevailing in the year 1980 for which, the references have been made in above referred both the judgments of this Court.

7. In the matter of exercise of the revisional jurisdiction by the higher authority, it is true that the power has to be exercised within reasonable time, but such reasonable time may vary from facts to facts and it may essentially depend upon the facts and circumstances of the case and prejudice which may have been caused on account of the delay, if any, to the parties who have altered their position. In the matter where there is inherent lack of power or the order is ab-initio void, the delay may not operate as a bar to the authority exercising the power. It is true that in the present case, there is delay of about 8 years in exercising the power of revisional jurisdiction and if considered from the date of purchase of the land by the petitioners then, the period of about 7 years and more to consider the facts and circumstances and the reasons recorded hereinafter, I find that it may not be necessary for this Court to conclude or set aside the order of the State Government only on the aspects of delay for initiation of

the action in revisional jurisdiction.

8. If the question is to be considered for exercise of the power by T.D.O. for grant of permission for N.A. use, it deserves to be recorded that the order for N.A. use permission came to be passed on 24/25.11.1980. In the decision of this Court in case of M/s.Yashkamal Builders, Baroda (Supra) at para 5 and 6 it has been recorded as under:

> "5. The Gujarat Land Revenue Rules, 1972 which were brought into effect on 1st September, 1976 as amended by the Amendment Rules, 1977, made provision for determination of rates of non-agricultural assessment. Under Rule 81 villages, towns and cities were divided into Classes A,B,C,D and E and areas adjoining such villages, town and cities were classified as Class I, II and III. Villages with a population upto 5000 were placed in Class E. There is no dispute that the land in question is in a village, which is in Class E under this Rule. By a Resolution dated September 25, 1978 in partial modification of the Government Resolution dated March 25, 1963, the State Government, in exercise of powers conferred upon it by sub-sec.(3) of Sec.157 of the Panchayats Act directed that out of the powers, functions and duties transferred to the District Panchayats under Government Notification dated July 16, 1971 and February 8, 1977, the District Panchayats shall delegate to the subordinate Panchayats the powers, functions and

duties specified thereunder. By this Resolution the State Government had desired that the powers, functions and duties under Sec. 65 of the Code transferred to the District Panchayats under sub-Sec.(1) of Sec.157 of the Panchayats Act should be transferred to Taluka Panchayats so far as Class B and E villages and towns as per classification under Rule 81 of the Gujarat Land Revenue Rules, 1972 are concerned. The District Panchayat of Panchmahals delegated these powers to the Taluka Panchayats in the District by a Resolution dated March 29, 1979.

6. However, before the District Panchayat of Panchmahals delegated the powers to the Taluka Panchayats under its Resolution dated March 29, 1979 as aforesaid the Taluka Panchayat of Halol by its Resolution passed on December 27, 1978 directed to delegate the power conferred under Resolution of the State Government dated September 25, 1978, (adverted to above) to the Taluka Development Officer for administrative convenience. As stated above, the Taluka Development Officer of Taluka Panchayat of Halol by his order dated December 17, 1981 granted permission for non-agricultural use of the land to the original occupant Mulchand Hirabhai Parikh. The view that the State Government has taken is that since the District Panchayat of Panchmahals had passed resolution on March 29, 1979 delegating powers to the Taluka Panchayats, the Taluka Panchayat of Halol could not have delegated powers to the Taluka Development Officer on December 27, 1978. It was observed that there was no delegation of powers to the Taluka Development Officer by the Taluka Panchayat of Halol subsequent to the

> Resolution dated March 29, 1979 of District Panchayat of Panchmahals. The Taluka Development Officer had, therefore, acted without authority and jurisdiction in granting permission for non-agricultural use of the land on December 17, 1981 as stated above. The State Government was, therefore, pleased to hold that the order passed by the Taluka Development Officer granting such permission was a nullity and deserved to be set aside. On merits also the State Government found the at the permission for non-agricultural use of the land could not have been granted. Under the circumstances, the State Government cancelled the order passed by the Taluka Development Officer granting such permission."

9. Further, as per the above referred decision of this Court in case of Yashkamal (Supra) such delegation of power to T.D.O. is held to be valid. Therefore, when at the relevant point of time i.e. on 25.11.1980, the powers were delegated to the T.D.O., it is not a matter for exercise of the power by T.D.O. for grant of permission under Section 65 of the Code without there being any authority whatsoever nor can it be said as inherent lack of power for grant of permission under Section 65 of the Code.

10. Even in respect to the restriction under Section 43 of the Act in case of Minaben Arvindlal Gandhi (Supra) at

paragraphs (iv) and (v), it has been recorded as under:

> "iv. At this stage it is required to be noted that the parcels of lands are new tenure lands or lands of restricted tenure, the transfer whereof is restricted under Sec.43 of the Bombay Tenancy and Agricultural Lands Act. Section 43(1) of the said Act, *inter alia*, provides that no land or any interest therein purchased by a tenant under Secs. 17B,32,32F,32-I, 32-O or sold to any person under Sec.32P or 64 shall be transferred or shall be agreed by an instrument in writing to be transferred without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government by general or special order determine, and no such land or any interest, therein shall be partitioned without the previous sanction of Collector. It is thus clear that even such a land of restricted tenure can be transferred after obtaining previous sanction of the Collector. Second embargo is that the amount of premium shall be fixed by the State Govt. and such premium shall have to be paid to the State Government. With respect to such parcels of new tenure land initially by Govt. resolution, dated 20th May, 1980 the power was given to grant permission for non-agricultural use, to District Panchayat or Taluka Panchayat on condition that at the time of granting permission the competent officer shall determine the amount of premium and shall order that such amount of premium be paid. The condition No.7 of the said resolution *inter alia* provided that where such parcels of lands are situated within Panchayat limits and when power is conferred upon the

District Panchayat or Taluka Panchayat the permission for non-agricultural use shall be granted after fixing the amount of premium as per Govt. resolution and after directing that the amount of such premium shall have to be paid to the Government. From the text of resolution dated 20th May, 1980 it becomes clear that even with respect to parcels of land in the present case the T.D.O. has power and authority to grant permission for non-agricultural use as per the resolution dated 20th may, 1980. What was expected of him was that he was required to fix the amount of premium as per Govt. resolution and he was also required to direct in the order that such premium shall be paid by the owner/occupant as a condition to the grant of permission for non-agricultural use. In fact, pursuant to such power conferred upon T.D.O., in number of cases permissions were granted by the T.D.O. for non-agricultural use.

(V). It appears that this matter came to the notice of the State Govt. and the State Govt. by its resolution dated 16th October, 1982 found that the Panchayat Officers were in fact granting permission for non-agricultural use even with respect to the new tenure lands and that they were determining the amount of premium. State Govt., therefore, by subsequent resolution deleted para 7 of the resolution dated 20th May, 1980 and instead provided that when the question of determining the amount of premium arises before the T.D.O. he shall refer the matter to the Dist. Collector or Dy. Collector and he shall get the amount of premium fixed by revenue officer and after such amount of premium is fixed he shall pass the order granting permission for non-

agricultural use based on the condition that the amount of premium so determined shall be paid by the applicant.”

11. Therefore, it appears that vide resolution of the State Government dated 20.05.1980, such powers were delegated to the authority granting permission for N.A. use which in the present case was T.D.O. However, such power came to be withdrawn and modified by the State Government by its subsequent Resolution dated 16.10.1982 whereas, the permission in the present case came to be granted by the T.D.O. in November, 1980 i.e. after the delegation, but prior to withdrawal of such power. Therefore, even qua the restriction as per the provisions of Section 43 of the Act is concerned, it cannot be said that the T.D.O. had not authority whatsoever nor can it be said that it was a case of inherent lack of power for fixation of the premium keeping in view the restriction under Section 43 of the Act while granting permission for N.A. use.

12. The State Government while passing the impugned order has lost the sight of both the aforesaid aspects and if the case was not falling in the category of exercise of the power by the authority, having no jurisdiction at all or inherent lack of power, it was

also required for the State Government to consider the matter on the ground of delay since the action is initiated in any case after the period of 7 years and more. It appears that the State Government has exercised the power under Section 211 of the Code while passing the impugned order as the Revisional Authority. In any case, the ground in the show cause notice was for want of authority on the part of T.D.O. Therefore, it was required for the State Government to examine the matter on the aspects of authority of the T.D.O. to grant permission under Section 65 of the Code read with the provisions of Section 43 of the Act for fixation of premium. As the said aspects keeping in view the resolution and the aforesaid legal positions referred to hereinabove in case of both the aforesaid decisions of this Court are not considered, it can be said that the State Government has not only committed error apparent on the face of record, but has also committed jurisdictional error in considering the grounds extraneous to the show cause notice, which may consequently result into breach of principles of natural justice.

13. In normal circumstances, this Court if is of the opinion that error apparent on the face of the record is committed by the State Government or there is

jurisdictional error, while exercising power under Article 227 of the Constitution of India, may remand the matter to the State Government for its reconsideration after taking into consideration the observations made by this Court. However, keeping in view the peculiar circumstances that the N.A. order came to be passed as back as in the year 1980 and the exercise of the revisional jurisdiction is in the year 1988 after a period of about more than 7 years and that issues have arisen in these petitions, are rather covered in the above referred decisions of this court and the petitions of year 1990 being considered final hearing in the year 2006, no useful purpose would be served in remanding the matter to the State Government for its reconsideration since on merits, the exercise of the power under Section 211 is found as illegal.

14. In view of the aforesaid, the impugned order passed by the State Government dated 14.03.1990 annexed at Annexure 'G' cancelling the order passed by the T.D.O. dated 25.11.1980 is quashed and set aside. The petitions are allowed to the aforesaid extent. Rule is made absolute accordingly. Considering the facts and circumstances of the case, there shall be no order as to costs.

(**JAYANT PATEL, J.**)

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